No. 93-440

Supreme Court, U.S.
F I L E D
OCT 20 1993
THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CAROL H. WILLIS,

Petitioner,

vs.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; MARY LYNN GOFORTH, individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; MARILYN BOWCUTT, individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and JOSEPH W. HERZBERG, individually and in his official capacity as Director of Personnel Services for University Hospital,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RAYMOND G. CHADWICK, JR.
Counsel of Record
GARY J. TOMAN
R. PERRY SENTELL, III
KNOX & ZACKS
Attorneys for Respondents
P.O. Box 2043
Augusta, Georgia 30903
(706) 724-2622

4353
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

16 pp

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Eleventh Circuit properly applied all of the state action tests which have been previously recognized by this Court.	5
II. The District Court and the Eleventh Circuit properly considered all of the particular facts of this case and found state action to be lacking.	8
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 6

Blum v. Yaretsky, 457 U.S. 991 (1982) 6, 8

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 6, 7, 8, 10, 11

Carol H. Willis v. University Health Services, Inc., d/b/a University Hospital, et al., 993 F.2d 837 (11th Cir. 1993) 5

Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984) 10

Flag Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 6

Contents

Page

Greco v. Orange Memorial Hospital, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975) 10, 11

Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974) 6, 8

Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987) 10

Milo v. Cushing Memorial Hospital, 861 F.2d 1194 (10th Cir. 1988) 10

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 6

NBC v. Communications Workers of America, 860 F.2d 1022 (11th Cir. 1988) 6, 7, 11

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 6, 8

Richmond County Hospital Authority v. Richmond County, 255 Ga. 183, 336 S.E. 2d 562 (1985) 5

San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee, 483 U.S. 522 ..... 6, 7, 8, 11

Statute Cited:

42 U.S.C. § 1983 ..... 1, 5

Contents

Page

United States Constitution Cited:

First Amendment 1

Fourteenth Amendment 1

STATEMENT OF THE CASE

Petitioner Carol Willis filed this action against defendant University Health Services, Inc., a private, non-profit corporation, as well as four (4) employees, both in their individual and official capacities (hereinafter "respondents") on December 28, 1990 in the United States District Court for the Southern District of Georgia. Petitioner brought this lawsuit pursuant to 42 U.S.C. § 1983, alleging that respondents' decision to terminate her employment violated her rights under the First and Fourteenth Amendments to the United States Constitution.

On August 8, 1991, respondents filed a motion for summary judgment on the grounds that Willis failed to establish that she had been deprived of a federally protected right "under color of state law" as required by 42 U.S.C. § 1983 and on the alternate grounds that Willis cannot establish any violation of her federally protected rights. The District Court heard oral arguments on the motion for summary judgment, and on July 27, 1992, entered an order granting UHS's motion holding that petitioner failed to establish state action since the state had not played any role in the decision to terminate her employment. The District Court did not reach the First and Fourteenth Amendment issues contained in UHS's motion for summary judgment. The District Court entered judgment in favor of all defendants on July 28, 1992. Petitioner filed her notice of appeal on August 3, 1992. The Eleventh Circuit affirmed the District Court by opinion, dated June 22, 1993, which holds that the petitioner failed to establish state action under any of the three tests previously recognized by this Court.

Respondent UHS employed petitioner as a registered nurse at University Hospital in Augusta, Georgia from December 1987 until January 2, 1990. The respondents' decision to terminate petitioner's employment was based on a loss of confidence due to poor judgment as exhibited by several incidents of conflict

between petitioner's practices and hospital policies.[1]

The petition is conspicuously void of the numerous facts existing in this case which were critical to the Eleventh Circuit's state action analysis. In 1984, respondent UHS was organized for the primary purpose of managing and operating University Hospital. The intended purpose of the restructuring was to enable the hospital to become more competitive in the marketplace by placing the operation of the hospital in the hands of a private, non-governmental entity which would allow the hospital to expand its operations outside of Richmond County.

Respondent UHS shares a common parent corporation, named University Health, Inc., with two other affiliated corporations named University Extended Services, Inc. and University Health Resources, Inc. The affiliated corporation named University Health Resources, Inc. is a for profit corporation which provides

---

1. The Eleventh Circuit's opinion is attached as Appendix A to the petition and its statement of the facts is a far more accurate account than that set forth in the petition. In addition to the newspaper editorial, quoted in the Eleventh Circuit's opinion, there were at least four other incidents where petitioner's conduct was contrary to hospital policies. This included one situation where a former student of petitioner's Bradley Natural Childbirth Classes, named June Edwards, advised hospital personnel of numerous statements which she contended were made by petitioner, that caused respondents great concern. Mrs. Edwards was a high risk pregnancy patient, and during these classes, petitioner allegedly gave her advice which could have been life-threatening, such as the following: to wait until her contractions were sixty seconds apart for at least two hours to decrease the likelihood of a C-section; that certain obstetricians were not informed regarding natural childbirth and did not know what was best for their patients; that IVs and monitors were not necessary and that students should stay at home as long as possible since the worst thing that could happen would be a home delivery.

Since the District Court's decision and the appeal turn on other facts, respondents have chosen not to discuss these incidents in greater detail.

contract laundry services as well as an answering service for physicians. The affiliated corporation named University Extended Services, Inc. has constructed and now operates two nursing homes.

In addition to operating the hospital, respondent UHS has also entered into a joint venture with St. Joseph, another local hospital, to develop Walton Rehabilitation Hospital and a life care community called Brandon Wilde. The two nursing homes, the life care community center and the laundry service were all constructed after UHS assumed the operations of University Hospital.

Respondent UHS, a private, non-profit corporation, operates University Hospital and its related facilities through a lease agreement executed between UHS and the Richmond County Hospital Authority ("RCHA"), on December 14, 1984. Pursuant to this lease agreement, UHS was given sole discretion to hire, terminate, promote or assign employees and to hire agents and independent contractors. The lease agreement also gives UHS broad authority to determine hospital operations and services in compliance with the goal of benefiting the public health needs of the community. Paragraph 12 of the lease clearly sets forth the relationship between RCHA, UHS and the employees of UHS and states, in pertinent part, the following:

> UHS shall have the discretion to hire, terminate, promote or assign employees and to hire agents or independent contractors. UHS shall also have the discretion to determine and to adjust salaries and employee benefits.

As Mr. Bray, the President of respondent UHS, has stated in his affidavit,

> No director, officer, agent or employee of RCHA, while working in such capacity, had any right whatsoever to exercise any control over the employment or termination of Carol H. Willis. Furthermore, no director, officer, agent or employee of RCHA, while acting in such capacity, exercised or attempted to exercise control or discretion over the employment or termination of Carol H. Willis.

In addition to giving respondent UHS the exclusive authority to make personnel decisions, the lease also gives UHS exclusive control over the management and operations of the hospital. UHS was given the power to diminish, curtail or cease services when it determined that such cessation will promote the public health needs of the community. UHS is also authorized to "augment, improve or increase any existing service, or add any service or shift current or new services to another facility. . ." In addition, respondent UHS has the authority to determine whether any acquisition, construction, or improvement of hospital facilities is necessary. UHS has "complete discretion" in deciding whether or not to repair or replace any asset which may become worn, inoperable or obsolete. The lease also authorizes respondent UHS to obtain policies of insurance such as business interruption insurance, which are payable solely to UHS. UHS has the authority to promulgate and enforce its own rules and regulations regarding safety, care and cleanliness of the leased premises.

UHS receives county funds to be used to offset operating costs and therefore, must disclose financial information to RCHA in connection with the hospital authority's oversight responsibility. However, UHS does not have a working relationship with RCHA in terms of UHS's operation of University Hospital. The quarterly meetings and business of RCHA and UHS are conducted separately through separate agendas.

Shortly after University Hospital's restructuring, the highest state court in Georgia was asked to analyze the relationship between RCHA and respondent UHS. *See Richmond County Hospital Authority v. Richmond County,* 255 Ga. 183, 336 S.E. 2d 562, 565 (1985). Applying Georgia's alter ego law, the Georgia Supreme Court held that RCHA and UHS are separate and distinct entities. *Id.*

Based upon these facts, the Eleventh Circuit, on June 22, 1993, affirmed in all respects the District Court's order granting respondents' motion for summary judgment. *Carol H. Willis v. University Health Services, Inc., d/b/a University Hospital, et al.,* 993 F.2d 837 (11th Cir. 1993).[2] The petitioner did not file a petition for reconsideration with the Eleventh Circuit, but instead filed her petition to this Court.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT PROPERLY APPLIED ALL OF THE STATE ACTION TESTS WHICH HAVE BEEN PREVIOUSLY RECOGNIZED BY THIS COURT.

Under 42 U.S.C. § 1983, the civil rights plaintiff must establish that the alleged violation of her federally protected rights was committed under color of state law. *See* 42 U.S.C. § 1983. Underscoring the primary focus of a federal court in determining whether state action exists, this Court recently reaffirmed its prior holdings and stated, "[m]ost fundamentally, this court has held that a government 'normally can be held responsible for a private

---

2. The facts of this case contradict the factual assumptions made by petitioner in the first question presented to this Court and this question certainly does not merit Supreme Court review.

decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].' " *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982); *Flag Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 357 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). Although the language cited above from the *Blum* Court spoke of holding the state liable pursuant to the state action doctrine, the standard remains the same when a party seeks to hold a private actor liable under the state action doctrine. Indeed, in *San Francisco*, this Court applied the *Blum* language to a civil rights claim directed against the United States Olympic Committee, a private corporation. *San Francisco*, 483 U.S. at 543.

This Court, as well as the Eleventh Circuit, has previously recognized that there are three primary tests which apply in cases where a party seeks to hold a private actor liable under the state action doctrine: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. *See San Francisco*, 483 U.S. 522; and *NBC v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988). Through the second question presented, petitioner argues that the Eleventh Circuit below erred by refusing to apply a fourth test which she refers to as the "symbiotic relationship" test announced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Petitioner maintains that the "symbiotic relationship" test is separate and apart from the nexus/joint action test applied by the Eleventh Circuit below. This argument is contrary to recent Supreme Court and Eleventh Circuit case law. This authority

indicates that the nexus/joint action and symbiotic relationship tests are one and the same. *San Francisco*, 483 U.S. at 547, n. 29; and *NBC*, 860 F.2d at 1026, n. 5. Addressing this issue, the Eleventh Circuit recently stated the following:

> *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939, 102 S. Ct. 2744, 2754-55, 73 L. Ed. 2d 482 (1982) separated the nexus and joint action tests, but a more recent Supreme Court case has merged the two. *See San Francisco*, __ U.S. at __ n. 29, 107 S. Ct. at 2986 n. 29. *See also, Jackson*, 419 U.S. at 357-58, 95 S. Ct. at 456-57.

NBC, 860 F.2d at 1026, n. 5.

Consistent with *San Francisco*, the opinion below clearly indicates that the Eleventh Circuit applied the "symbiotic relationship" analysis described in *Burton* to the facts of this case in determining whether petitioner met the nexus/joint action test:

> Hence, we only address whether Willis has shown that UHS and RCHA are so intertwined in a "symbiotic relationship" that they satisfy the nexus/joint action test, thereby demonstrating the existence of state action.

(Petition, App. A, p. 13a). The Eleventh Circuit performed an extensive factual analysis of the relationship between RCHA and respondent UHS and held that petitioner failed to satisfy the nexus/joint action test. (Petition, App. A, pp. 18a-19a). Petitioner's argument that the courts below failed to properly apply the correct state action tests is without merit.

The Eleventh Circuit also correctly held that petitioner failed

to meet the remaining two state action tests.[3] First, petitioner could not establish state action under the public function test since respondents did not exercise powers traditionally reserved for the state. (Petition, App. A, p. 13a). *See also, Rendell-Baker*, 457 U.S. at 842; and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). Secondly, petitioner did not satisfy the state compulsion test since RCHA did not coerce or encourage respondents to terminate petitioner's employment. (Petition, App. A, p. 13a). *See also, San Francisco,* 483 U.S. at 547; and *Blum*, 457 U.S. at 1004. Accordingly, the Eleventh Circuit correctly applied all of the state action tests established by the precedent case law of this Court.

II.

THE DISTRICT COURT AND THE ELEVENTH CIRCUIT PROPERLY CONSIDERED ALL OF THE PARTICULAR FACTS OF THIS CASE AND FOUND STATE ACTION TO BE LACKING.

Petitioner is requesting that this Court re-examine the particular facts of this case which have been thoroughly analyzed by the two courts below. As stated in the *Burton* opinion, upon which petitioner relies, "only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. The court below applied the sifting factual analysis required by *Burton*, but unlike *Burton*, found that state action was lacking in this case.

---

3. Petitioner's questions presented numbers four and five clearly do not merit review by this Court. An abundance of case law precedent from this Court has definitively dealt with these issues. In fact, during oral argument before the Eleventh Circuit, counsel for petitioner abandoned her arguments under these two tests.

In particular, the Eleventh Circuit recognized that the following facts demonstrate that UHS and RCHA are separate and distinct entities serving different purposes: (1) UHS assumed control of the hospital so that it could be competitive outside of Richmond County; (2) University Health, Inc. is the parent corporation for UHS and other services; (3) UHS has entered into a joint venture with the local hospital to develop other care facilities; (4) UHS has broad discretion to diminish, curtail or cease services to promote the public health needs of the community; (5) UHS is authorized to "augment, improve or increase any existing services or add any service or shift current or new services to another facility"; (6) UHS has authority to determine whether acquisition, construction, or improvement of hospital facilities is necessary; (7) UHS has sole authority to repair or replace any of its assets; (8) UHS may obtain insurance policies payable solely to UHS; (9) UHS has the authority to enforce rules and regulations regarding safety and care; and (10) UHS controls the daily operations and management of the hospital. (Petition, App. A, pp. 7a-8a).

Moreover, in concluding that respondents' decision to terminate petitioner's employment did not constitute state action, the Eleventh Circuit stressed the following factors:

> Most importantly, however, the lease relinquishes RCHA of all liabilities, gives UHS sole discretion to hire and fire employees, provides that UHS is the governing body of University Hospital and medical staff, mandates that UHS maintain and repair the leased property at its own expense, requires UHS to maintain insurance, confers upon UHS the right and authority to make and enforce rules and regulations and safety considerations, and demands that UHS hold RCHA harmless from any court action. Thus,

> UHS and RCHA are not so intertwined in a symbiotic relationship as to satisfy the nexus/ joint action test.

(Petition, App. A, pp. 17a-18a).

Accordingly, petitioner's argument that UHS is merely a legal fiction of RCHA is unconvincing. Although RCHA has some concomitant oversight responsibilities in connection with the funding it gives to support hospital operations, the day to day management and operation of University Hospital is performed by UHS, a private corporation.

Since, as recognized by the Eleventh Circuit, RCHA and UHS are separate and distinct entities, the petitioner's arguments that it is unfair to recognize the private nature of UHS must also fail. Petitioner's suggestions that RCHA reorganized and placed the operations of University Hospital in UHS's control merely to avoid liability for wrongful termination claims is simply unsubstantiated by any evidence. As recognized by the Eleventh Circuit, the evidence in the record for this case shows that the purpose of the restructuring was to allow University Hospital to increase its service area and compete with other private medical providers outside of Richmond County. (Petition, App. A, p. 7a).

In question presented number three, petitioner, relying on selective facts, also argues that the Court should grant certiorari in this case due to a "conflict among the circuits" in applying the "symbiotic relationship" test of *Burton* to other cases. *See Greco v. Orange Memorial Hospital*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984); *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987); and *Milo v. Cushing Memorial Hospital*, 861 F.2d 1194 (10th Cir. 1988). The holdings of these cases are not in conflict

with one another, but, rather, involve application of the *Burton* "symbiotic relationship" analysis to a variety of factual contexts. The Eleventh Circuit below analyzed the factual and legal analysis of these cases and held that the Fifth Circuit's decision in *Greco* was the correct application of *Burton*'s symbiotic relationship test to facts similar to those found in this case. Petitioner's contention that the application of the *Burton* "symbiotic relationship" analysis to these previous cases merits review is merely an additional effort to have this Court sift through the factual scenario of this case which has twice been thoroughly examined by the courts below.

Furthermore, to the extent that any conflict may be deemed to exist between the application of the "symbiotic relationship" test to the particular facts of these cases, such conflict does not justify review in this case. The Eleventh Circuit's ruling under consideration is consistent with the most recent decisions of this Court discussing the application of *Burton*'s "symbiotic relationship" test. In *San Francisco*, 483 U.S. at 547, n. 29, this Court indicated that even under the *Burton* test relied upon by petitioner, the intertwining connections between the state and the private entity which form the "symbiotic relationship" must somehow involve the alleged constitutional violation. *Id.; see also, NBC,* 860 F.2d at 1027. The evidence in this case convincingly demonstrates that the connections between RCHA and respondent UHS, relied upon by petitioner, were not involved with nor did they influence the respondents' decision to discharge petitioner. The Eleventh Circuit correctly concluded that, based upon the facts of this case, state action is not present and the Eleventh Circuit's determination in this regard should not be disturbed.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND G. CHADWICK, JR.
Counsel of Record
GARY J. TOMAN
R. PERRY SENTELL, III
KNOX & ZACKS
Attorneys for Respondents
P.O. Box 2043
Augusta, Georgia 30903
(706) 724-2622